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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 69

JOE VALDEZ GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 97-99) is reported at 212 F. 2d 71. The order of the District Court denying a motion for judgment of acquittal, incorporated by reference in the opinion of the Court of Appeals, appears at R. 81-92.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1954 (R. 97). The petition for a writ of certiorari was filed on May 10, 1954, and

was granted on October 14, 1954 (R. 100). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial by the selective service appeal board of petitioner's claim for classification as a conscientious objector was without basis in fact.

2. Whether it is required by the Fifth Amendment or the Universal Military Training and Service Act that a registrant be given further notice and further opportunity to support his claim for classification as a conscientious objector after the Department of Justice has made its recommendation to the appeal board.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Selective Service Act of 1948, and implementing Selective Service regulations, are set forth, *infra*, pp. 36-40.

STATEMENT

Petitioner was found guilty of refusing on February 19, 1953, to be inducted into the armed services. He was sentenced to imprisonment for three years and fined $500. (R. 93.) On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of conviction (R. 97), holding that the induction order was based on a valid classification (R. 97-99).

Petitioner's record with the Selective Service System may be summarized as follows:

He was born on July 22, 1931, and registered under the selective service laws on January 4,

1950 (R. 34). In his classification questionnaire, filed on March 9, 1951, petitioner claimed that he had been ordained as a minister of the Jehovah's Witnesses sect on February 19, 1950 (R. 37),[1] and that he was a conscientious objector "to participation in war in any form" (R. 39).

He further stated that his education had consisted of elementary school, two years of high school (from which he was not graduated), and "private instruction by Prof. H. Graffis" in the Bible, commencing in November, 1949, and leading to a certificate on October 1, 1950 (R. 38);[2] that he had been married on September 27, 1948 (R. 37); that he had been working for four years as a "crater bander and car checker", but did not expect to continue indefinitely in this trade (R. 37-38); that since August 19, 1950, his work had been with Great Lakes Steel Corporation; and that he presently worked an average of 40 hours per week at $1.50 per hour (R. 38).

Under the space in which the petitioner was given his option of indicating the classification to which he thought he was entitled, he indicated "Regular or ordained minister" (R. 39).[3]

In his special form for conscientious objectors, filed on April 3, 1951 (R. 43), petitioner claimed

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[1] Elsewhere in the record it appears that this "ordination" of February 19, 1950, consisted of being baptized (R. 13, 67).

[2] Although the petitioner described his religious training as "private instruction" in his questionnaire (R. 38), it became alternatively "home Bible studies" and "divinity school" in his special conscientious objector form (R. 44).

[3] Although in the printed record (R. 39) it would appear that this answer was under another space, reference to the original questionnaire shows that he crossed out an entry in the space provided, and made the entry in the next insert line.

exemption from combatant and noncombatant service. He stated (R. 43):

> The basis for my belief is found in the ten commandments of God found in the Bible—Love of God and Love of neighbor—Anything that would cause me to violate these I couldn't do.

He said that he believed in force "[i]n protection of person and ministerial activities, but at no time in aggression" (R. 44); that the depth of his religious convictions was demonstrated by the fact that in December 1949 he "started out actively in the service of God, after some home Bible studies and on October 1 of 1950 was recognized as a pioneer" (R. 44); that he had given no public expression to his claim of conscientious objection, except as "stated above" (R. 44); that both his parents were Catholics (R. 45-46). In response to the request in the form for an official statement of his sect in relation to participation in war, petitioner stated, "I am basing myself entirely on my knowledge of the Bible" (R. 46).[4]

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[4] The selective service file also discloses the following, filed on April 8, 1951:

1. An affidavit of 22 persons that they "recognize[d]" petitioner as "a minister of the Gospel"; that they had observed him for a year and a half regularly attending meetings for advanced study and "attending and taking part in the divinity school of Jehovah's Witnesses as well as performing other duties required of ministers of the Gospel" (R. 48).

This affidavit refers to petitioner's participation in Bible study and "other duties required of ministers of the Gospel", and concludes "All of his said activities having been observed

Petitioner attached to this special conscientious objector form (R. 44) an unsigned printed form dated October 1, 1950, under the letterhead of the Watchtower Bible and Tract Society which, though not mentioning petitioner by name, told the bearer (R. 41-42):

Date October 1, 1950 SC

THIS CARD CONSTITUTES YOUR PIONEER ASSIGNMENT to witness in territory of the Downtown Unit, Detroit, Mich. Company, obtaining territory locally from the servant. This includes business districts. Please show this card to the company servant as his notification of your assignment. Return it to this office when you are through working there.

Servant: [blank] Your fellow witnesses,
Watchtower Bible and Tract Society, Inc.
This assignment cancels all previous assignments.[5]

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by us regularly during the past one and one-half years." Since the affidavit is dated April 1, 1951, that would put the commencement of his ministerial activities back to October 1, 1949, when by his own admission he did not begin his Bible studies until November 1949 (R. 38), and had not "started out actively in the service of God" until December 1949 (R. 44), and the record shows he was not baptized ("ordained") into the Jehovah's Witnesses faith until February 19, 1950 (R. 13, 37, 67).

2. A certificate of four persons that petitioner was "conducting weekly Bible studies with [them]", and that they "recognize[d] him to be a minister of the gospel and [they] received spiritual benefit by his weekly visits" (R. 49).

[5] Evidently during the hearing before the local board, petitioner procured another copy of the pioneer assignment form and had a Mr. Paul Truscott, his presiding minister, sign it (R. 59, see also: R. 46).

On April 10, 1951, petitioner was classified III-A, which entitled him to dependency deferment (R. 40). He requested a personal appearance before the board (R. 49), but the case was forwarded to the appeal board, which likewise classified him III-A (R. 50). He was so notified on June 15, 1951 (R. 40).

On January 8, 1952, petitioner was reclassified I-A (available for military service) (R. 35, 40).[6] Pursuant to his request, he was granted a hearing before his local board to contest the new classification (R. 10, 50). At the hearing on February 12, 1952, petitioner testified that he had been a "pioneer" (i.e., "a person who attends full time") since October 1950, and that his "ministerial duties" consumed a hundred hours per month (R. 53). His particular job was as "advertising servant of the downtown unit" and in this capacity he distributed two thousand magazines per month (R. 55). He further testified that his 40 hours per week (i.e., "the usual working week") with the steel company did not interfere with his religious work (R. 53, 56). His congregation met every Thursday and "sometimes talks [were] handed to [petitioner] that [he] should make and other times

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[6] The Act of June 19, 1951, c. 144, title I, Sec. 1, 65 Stat. 75, 85 50 U.S.C. App. 456(h), removed as a basis for dependency deferment (Class III-A) the fact that a registrant has a wife, unless there are also children or unless circumstances of "extreme hardship" and "privation" would result to the wife from conscription of the husband. See also the implementing regulation, 32 C.F.R. 1622.30, promulgated on September 28, 1951.

[petitioner] conduct[ed] Bible studies with different people" in homes and also in the hall of the ministry school (R. 55-56). He had no particular church of his own, but attended with the others a Theocratic Ministry School, which was not recognized as a divinity school by the State of Michigan (R. 56-57).

Petitioner further testified that, as stated in his special conscientious objector form, his claim that he was a conscientious objector was based entirely on his personal interpretation of the Bible (R. 54, 57). He said that there was no tenet of Jehovah's Witnesses "relating directly to war"; that "it is up to each one to go according to their own conscience"; and that some Jehovah's Witnesses have joined the army and navy "and that is by their own conscience" (R. 57). He was then questioned as to how he could reconcile his religious beliefs with his work with the Great Lakes Steel Company which manufactured articles of war (R. 57-58). He replied that this (R. 58), "does not have any bearing in my belief any more than my paying an income tax", and "I feel I have to make my living some way even if I raised pigs, and I am still doing the same thing when I pay my income tax. I do not know where the money goes but that is not my business. 'Is rendering unto Caesar things that are Caesar's' ". He explained that he could not give his life for Caesar (R. 58), "because it does not honestly and truthfully belong to him. It belongs to God who gave it. Caesar's things which belong to him are those things such as—obey-

ing his words so far as they are not in objection or against God's command." He stated he would be the sole interpreter of what belongs to Caesar, and that (R. 59):

> While the statement is for not supporting Caesar because God's Word says not to kill, it states that friendship of the world, which is commerce and politics which makes up the world, is enmity with God.[7]

In addition to the transcript of the local board proceedings, the board also prepared a summary of his testimony which appears in petitioner's selective service file (R. 51-52).[8]

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[7] At his trial, petitioner told the court that he was not a pacifist, and that (R. 32) "under certain circumstances, and those would be only biblical, I possible would defend myself." He explained "biblical" circumstances as follows (R. 32-33):

"By that I mean that if it were only a command from God, like it was in the time of the Israelites. In the times of the Israelites many wars were fought but it was simply because the nation of Israel represented God's Kingdom on earth and today there is no nation that represents God's Kingdom on earth or that is the political expression of His Kingdom here on the earth."

[8] The summary states:

GONZALES 2/12/52
Claims he is a minister or C.O.
Ordained in Feb. 1950.
Pioneer in Oct. 1950.
Employed at Gt. Lakes Steel—8-18-50 to date.
Not a paid minister.
No certificate of ordination.
All activities are voluntary.
Advertising Servant for Downtown Area—Distributing magazines.
Meet various days for bible study.

[Footnote cont'd on next page]

On February 19, 1952, the I-A classification was continued by unanimous vote of the local board (R. 40), and on February 25, 1952, petitioner noted an appeal (R. 61). The appeal board, after making a tentative finding against the I-O (conscientious objector) claim, or lower classification, forwarded the file to the Department of Justice for hearing (R. 41, 64-65). The Department of Justice, on December 1, 1952, reported to the appeal board the following additional facts, *inter alia:* that petitioner had previously been a Catholic, and that his five sisters and a brother, as well as his parents, were Catholics (R. 67); that petitioner's wife had become a Jehovah's Witness in 1941 and petitioner was "baptized a member in February 1950" (R. 67); and that petitioner and his wife were "said to be very religious" (R. 67). It states, "Registrant bases his claim for exemption upon his own personal interpretation of the Bible with the guidance of the Watchtower Bible aids and relies particularly on the Ten Commandments. He

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Meet at various homes of members.
No church as such.
Does missionary work.
Theocratic Ministry School.
Not a school of theology.
Theocratic Aid to Kingdom Publishers a book outlining procedure. No declaration in book or teaching directly outlawing war.
It is a matter of person interpretation.
2/19/52 IA JG IA PON.
Reason for working—Manufacturing materials for war. Would not aid injured if hurt in aggressive way or in battle. "Render Unto Ceasar," etc.
2/19/52.
IA JG.

believes in the use of force in self-defense." (R. 67.) The report concluded (R. 67-68):

> After a personal appearance, the Hearing Officer stated that registrant appeared to be a sincere Jehovah's Witness but concluded that his affiliation with that sect has been too recent and too closely related to his draft status to warrant the acceptance of his conscientious objector position as genuine. The fact that registrant became a member of the Jehovah's Witness sect one month after his Selective Service System registration in January, 1950, despite the fact that his wife had been a member for many years, lends weight to this conclusion.
>
> After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained.

Petitioner was unanimously classified I-A by his appeal board on December 11, 1952 (R. 68-69). By letter of December 21, 1952, he attempted to appeal his case further on the basis of his claim to being a minister (R. 69-70). On January 13, 1953, he was notified that as the final classification by the appeal board was unanimous, no further appeal

was available (R. 71-72).[9] On February 3, 1953, petitioner was ordered to report for forwarding to an induction station on February 19, 1953 (R. 73). On February 19, 1953, petitioner reported but refused to be inducted (R 76-78).

At the trial, the Department of Justice hearing officer's report to the Department, dated August 11, 1952, was submitted in evidence. It summarized the facts adduced in petitioner's appearance before him and in an F.B.I. report, substantially as related above in the summary of petitioner's statement and the recommendation of the Department of Justice (R. 12-16). Upon cross-examination, the hearing officer was questioned very closely about his statement in the report that petitioner had "appeared" to be "a sincere Jehovah's Witness". The hearing officer explained that despite petitioner's "appearance" on the hearing "his adoption of the Jehovah's Witness sect was too closely affiliated with his registration with the Selective Service" ("It seemed to be contemporaneous with his registration"), and "He was baptized in the Catholic faith, all of his family were Catholics, and he was such until 1948." He emphasized that this time parallel "was material to me because *I based my recommendation and conclusion upon the entire file*" [emphasis added] (R. 19). The witness was then asked whether "a person could not be a conscientious objector today because he was

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[9] On February 2, 1953, petitioner requested and received a copy of the transcript of his local board hearing (R. 73).

not one yesterday?" (R. 19). He replied that the question was not one to be answered "as a general question" since "this particular case was an exceptional one" (R. 19). Then ensued the following question and answer (R. 20):

> Q. (By Mr. Leithauser) To be more specific, why did you feel in this particular case, Mr. Ray, that the proximity of the time when he became or claimed to become a Jehovah's Witness prevented him from being classified 1-O?
>
> A. Based upon his antecedents, his religious background, the proximity of his conversion or adoption of the Jehovah's Witness sect to his classification by the Selective Service and also the manner in which he claimed to be a Pioneer, which is a very unusual thing, as far as Jehovah's Witnesses are concerned. All of that added up to one thing to me. And I have had other cases where people would adopt a conscientious objector sect or a religious affiliation just in order to avoid induction or induction into the military service.

In denying a motion for acquittal (R. 81-92), the trial court summarized the evidence contained in petitioner's selective service file and made a specific determination that his final classification was supported by ample basis in fact (R. 83-85). The Court of Appeals for the Sixth Circuit, in affirming the judgment below (R. 97-99), made a

similar finding for the reasons set forth by the district judge (R. 99).

SUMMARY OF ARGUMENT

I

Petitioner failed to convince either the two selective service boards, the hearing officer, or the Attorney General's representative, that his alleged objections to combatant and noncombatant service were sincerely held. There is ample basis in fact to support this unanimous conclusion. Petitioner became of draft age on July 22, 1949. Although he came from a Catholic family and background, and apparently remained a Catholic until the fall of 1949 (or at least until his marriage in 1948, Pet. Br. 22), in November 1949, when registration became imminent, he commenced home Bible studies, and in December 1949 undertook some unexplained religious activities, just before his registration on January 4, 1950. In February he was baptized, and although he apparently had no duties of significance until the following fall, he claimed to be an "ordained minister" from that date. On June 24, 1950, the Korean war commenced and on August 19, 1950, he went to work for a steel company making implements of war. That fall, at a time of increasing tempo in the draft process, he became a "pioneer" under circumstances which appeared to the hearing officer to be unusual, and began for the first time to distribute magazines for his faith as one member of a "downtown unit" and to engage in other religious ac-

tivities after a full work-day in the steel plant.

This close synchronization of his religious activities with pressing draft possibilities, together with his inability to support his claim on anything except his own say-so, his equivocations to the local board, his sudden emergence from a dissimilar religious background to become a "minister" the month after registration, the acceleration of his religious activities after the commencement of the Korean conflict, his subsequent employment in a defense plant engaged in making war materials, the insubstantial character of his claim to be an ordained minister for draft purposes, all combine to discredit the good faith of his objections and provide ample basis in fact to support his final classification by the appeal board.

II

Petitioner also argues that after the hearing he should have been served with the hearing officer's report and the Department of Justice recommendation prior to their consideration by the selective service appeal board so that he would have an opportunity to challenge them before the Selective Service System. Since there is no statutory authority for this extra procedural step and selective service regulations do not otherwise provide for it, petitioner is necessarily obliged to show that its absence results in such essential unfairness as would violate due process. This he has not done. The opinion of this Court in *United States* v. *Nugent*, 346 U.S. 1, makes clear that the Department of Justice "hearing" is not the equivalent of a

trial but is an investigative-advisory proceeding the purpose of which is "to forward sound advice, as expeditiously as possible, to the appeal board". Since the "advice" is only one part of the case considered by the appeal board, and may be accepted or rejected in whole or in part by that body, it is not the equivalent of an administrative order. No separate hearing is required to meet the conclusions contained in such an advisory report. Cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 318-319; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103; *Williams* v. *New York*, 337 U.S. 241.

Before his local board and at the Department of Justice hearing a registrant has ample opportunity to produce evidence and give full expression to his views. At the hearing he can rebut any adverse information. To allow the registrant a second opportunity to contest the facts underlying this recommendation of the officer who saw and heard him would merely afford new opportunity to record his disagreement which is already of record.

Due process is a matter to be considered in context. In this instance its demands are amply met by allowing the registrant opportunity to present his case and to rebut adverse information.

ARGUMENT

I

The Selective Service Boards Had A Basis in Fact to Reject Petitioner's Assertions of Conscientious Objection.

Although petitioner made alternative claims before the selective service boards to be both a mini-

ster and a conscientious objector, the gist of his present argument is that the rejection of his conscientious objector claim was without basis in fact. In attempting to develop this argument petitioner initially assumes that "the uncontroverted evidence supporting [his] claim places him prima facie within the statutory exemption * * * " (cf. *Dickinson* v. *United States,* 346 U.S. 389, 397). Building on this assumption he concludes that there is no fact of any probative value to overcome his "proof" that he is opposed to all military service, combatant as well as noncombatant, and therefore that the rejectior of his conscientious objector claim was the result of an arbitrary decision.

Before discussing the issue of whether there was any evidentiary matter in petitioner's selective service file on which the appeal board could have based its rejection of his claim, it is pertinent to observe that the objective tests for the ministerial exemption employed in the *Dickinson* decision (e.g. hours of service, ministerial duties, congregational leadership, education, recognition of status, ordination, etc.) cannot be transposed to fit the different statutory scheme by which the subjective questions of personal belief are tested, as we have more extensively developed in our briefs in *Simmons* v. *United States,* No. 251, this term, and *Witmer* v. *United States,* No. 164, this term. Petitioner's attempts to generalize the issues involved in the instant case (i.e. Is a last minute conversion a sincere conversion?) amply illustrate the fact that there is no precise litmus test by which "the character and good faith of the objections of the

person concerned" [10] can be appraised. Each registrant who claims conscientious objector status does so on an individual basis. Not only are there an infinite variety of individuals who appear before selective service boards, but each has a background which differs from all others. In addition, there are great variations in religious beliefs which are articulated in many ways and in varying degrees of clarity.

Congress has delegated to the Selective Service System the function of determining whether any particular claimant has adduced facts which establish his right to a narrowly drawn exception to the general duty of military service in times of national emergency. Cf. 32 C.F.R. 1622.1(c). This process consists of more than the mere examination of what he may be willing to put down on an impersonal government form. It requires a comprehensive type of appraisal which, in order to detect the good faith of what a claimant may say, also looks to the nature of what he does.[11] Statements of belief to the Selective Service System have a self-serving quality which to some extent lessens their evidentiary value. They can, how-

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[10] Section 6(j) of the Universal Military Training and Service Act (*infra*, p. 37).

[11] This is exemplified by the type of questions set forth in the special form for conscientious objectors (cf. e.g., "Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.") (R. 42-47). This petitioner could cite no instance when he had communicated his conscientious scruples against participation in war to others.

ever, be corroborated by evidence of a consistent way of life which bespeaks sincerity. Stated in the converse, it is not enough that a claimant profess the sincerity of his beliefs for the record, if his way of life, manifest in the history set forth in his selective service file, could legitimately be interpreted by the Selective Service System to refute such formal assertions. This is the obvious intention of Congress, which, after providing for the exemption from both combatant and noncombatant training and service in the armed forces of the registrant who, *by reason of religious training and belief* (i.e., "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation", but not including "essentially political, sociological, or philosophical views or a merely personal moral code") "*is conscientiously opposed to participation in war in any form*", then went on to provide a special inquiry by an outside agency (the Department of Justice) on the "*character and good faith of the objections of the person concerned*" [Emphasis added]. Obviously, Congress did not intend that any claimant could obtain the exemption by reciting a rote or formula of words which has not been assimilated by him as an article of faith and been given personal meaning in his way of life. The proposition that "actions speak louder than words" has particular applicability in this context. In order to demonstrate that what he says is actualiy a "belief" he must show that his behavior reflects the sincerity of his inner convictions. Where this consistency is not

demonstrated and where the claimant has not adequately explained away those inconsistencies between his formal statements of belief and incongruous action-patterns, the Selective Service System is entitled to draw logically permissible inferences from the discrepency and to base its rejection of the claim on such circumstantial evidence.

In this case the appeal board's final classification was necessarily based on a totality of all of the evidence transmitted to it and contained in petitioner's selective service file. It's rejection of petitioners conscientious objector claim is amply sustained by factual circumstances which could reasonably have led to a conclusion that his objections were not made in good faith. It is not disputed that, if there was basis in fact for the selective service classification, the courts will not disturb that classification. *Estep* v. *United States*, 327 U.S. 114.

An anlysis of that evidence shows the following facts:

Petitioner became of draft age on July 22, 1949. Prior to the fall of 1949, or at least until his marriage in 1948, he had been a Catholic as had his mother, father, five sisters, and a brother. There is no showing that he manifested any significant interest in other religious activities until the demands of military service became imminent. According to his own statement he commenced "private instruction by Prof. H. Graffis" in the Bible, in November 1949. On January 4, 1950, he regis-

tered under the selective service laws, and on February 19, 1950, he was baptized into the Jehovah's Witnesses faith. On June 24, 1950, the Korean war commenced, and on August 19, 1950, petitioner went to work for a steel company which he admits made implements of war.

Petitioner produced an unsigned form or card of the Watchtower Bible and Tract Society that neither bore his name nor signature of an officer of his church to show that he became a "pioneer" on October 1, 1950. Registrant explained the term "pioneer" as applying to one "who attends full time," which apparently meant "full time" after his forty hours a week of secular employment (R. 53). This card purportedly emanated from the office of that Society in Brooklyn, New York. During his local board hearing, however, he produced a copy of that form signed by his *own* presiding minister in charge of his unit.

After October 1, 1950, petitioner's principal religious duty seemed to consist of distributing or selling magazines for the Watchtower Bible and Tract Society as one member of a "downtown unit" under the leadership of a company servant who assigned him his territory. In his questionnaire received by his local board on March 9, 1951, however, he indicated that he was "regularly" serving as a minister; that he had been a minister since February 19, 1950 (the day of his baptism);[12]

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[12] There are conflicting statements in the record concerning the date when petitioner became a "minister". Since baptism into the Jehovah's Witness faith is considered tanta-

and that he had been formally ordained (on the same date). He also indicated his continuing employment with the steel company on a forty hour week basis.

The Department of Justice hearing officer on personal interview found that petitioner "appeared to be a sincere Jehovah's Witness" (i.e., gave the appearance at the hearing of being sincere in his religious affiliation) but nevertheless concluded that on the basis of his "entire file and record", including evidence of close synchronization between religious activities and pressing draft possibilities, his assertions of conscientious objection were not made out [13]

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mount to the ritual of ordination (all Jehovah's Witnesses being "ministers") it would seem that February 19, 1950, would mark petitioner's entry into the faith and give him status as a "minister", in the sense that the sect employs that term to encompass its entire membership. On the other hand there is an affidavit of 22 persons in the file (R. 48) to the effect that they recognized petitioner as a minister, that aside from religious meetings he had been "performing other duties required of ministers of the Gospel", and "All of his said activities" had been "observed" by the signators, "regularly during the past one and one-half years." Since the affidavit was dated April 1, 1951, his ministerial duties would relate back to October 1, 1949, several months before his formal entry into the faith, if the affidavit is given its literal meaning. In his special conscientious objector form when asked (R. 46), "When, where, and how did you become a member of said sect or organization?", he replied "In Dec. 1949, in Detroit, Mich., by actively serving".

[13] Petitioner states categorically in his brief (Pet. Br. 39) that "The hearing officer found Gonzales to be a sincere member of Jehovah's Witnesses." This conclusion was probably drawn from the language of the report that he "appeared" to be a sincere Jehovah's Witness. That comment was un-

These facts were all known to the appeal board and must be assumed to have been considered by them in rendering a unanimous vote against petitioner. The inquiry then is whether these facts considered in their totality support the selective service classification. We submit that the findings of the two courts below that they do is well reasoned. First, as the hearing officer observed, there is a close synchronization between petitioner's religious activities and selective service demands. Petitioner had been a member of another faith, and, for all the record shows, remained a Catholic until the fall of his eighteenth year, and a year after marrying a member of the Jehovah's Witnesses faith. By his own admission he took no active part in religious activities until December 1949 when eventual induction became imminent. In February he was baptized into the Jehovah's Witnesses faith a month after he actually registered. Although there is scant evidence that petitioner took any prominent role in religious activities before, on October 1, 1950, three months after the outbreak of the Korean War when induction was being speeded up, and the grav-

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doubtedly included to apprise the appeal board of the impression petitioner made at the hearing—information which would not otherwise be in the record. Even though the hearing officer discounted it in his evaluation, he could properly apprise the appeal board of this favorable factor. This impression, however, was not, as petitioner would have it, a finding that petitioner was in fact actually sincere or that he had personal beliefs regarding participation in war which met the statutory standards of "good faith." Reference to the hearing officers full recommendation (R. 15) and his later testimony (R. 18-20) indicates quite the reverse.

ity of our military commitments in Asia became apparent, he became a "pioneer" or "advertising servant".[14] Then and then only did he begin to devote an appreciable amount of time to religious activities. The close time parallel between his draft status and his religious activities could well have impressed the appeal board as no mere matter of coincidence.[15]

Other factors substantiate the fact that petitioner did not have the deep and abiding revulsion to both combatant and noncombatant service that he claimed. His principal emphasis before the local board was an attempt to show that he was an ordained minister. The dubious nature of this claim is in and of itself significant. He was not recognized as

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[14] As we have indicated, his assignment as a "pioneer" was made under rather peculiar circumstances in that his commission consisted of a mere impersonal printed form which was not even signed until shortly before or during his local board appearance. In his trial testimony the hearing officer cited as one basis of his recommendation (R. 20), "the manner in which he claimed to be a Pioneer, which is a very unusual thing, as far as Jehovah's Witnesses are concerned."

[15] Petitioner states (Pet Br. 40) that "The late change from Catholicism to the belief of Jehovah's Witnesses is no basis in fact whatever". Even if this were true of a late conversion standing by itself, it does not stand alone here. What makes the religious change in petitioner's record meaningful is his sudden emergence from a totally dissimilar background —at the precise time that he could feel the hot breath of the draft on his neck—to become a "minister" without any apparent duties or following. It is the close synchronization of his religious activities with the pressing draft that is significant. The change factor derives meaning from the context of all other evidence indicative of insincerity, and need not be considered as an abstract proposition. See also the Government's Brief in *Simmons* v. *United States*, No. 251, this term, pp. 23-24.

a leader or pastor either by a congregation of his own or by the public generally. Apparently he did not preach or teach. He performed no ordinances of public worship. He was simply one of a "downtown unit" of his faith engaged in group religious activity in his spare time. It is difficult to conceive that petitioner could have seriously and genuinely regarded his status as one of such a group sufficient to entitle him to preferential treatment under the selective service laws. This conclusion is reinforced by the fact that he related his ministry back to a time before he was assigned to a unit, and to a time when he performed few or no duties that even a zealous congregant of his faith might perform. His willingness to exaggerate, to stretch a point, and even to misrepresent in important particulars his ministerial claim, detracts by logical implication from his claim of being a conscientious objector with good faith scruples against any participation in the armed services.

There are other significant facts contained in petitioner's file. Bearing in mind that he claimed absolute exemption from military service on the basis that his conscience would not permit him to perform noncombatant duties as well as combatant, it may well have impressed the appeal board that almost two months after the commencement of the Korean conflict petitioner sought and was given employment in a steel factory engaged in making implements of war. When asked how the fact that the factory manufactured some articles that are used in war affected him, he replied (R. 58), "It does not have any bearing in my belief any more

than my paying an income tax." Then while telling the local board that it was of no concern to him that his work in a defense plant "would help create articles of war that kill people", he told them he would only assist wounded people "If they were not injured in aggression or if they were not in support of a political party", but not if they were "injured in battle" (R. 58).[16] The principal thrust of his statements to the appeal board was that he wished to maintain a position of personal neutrality from all wordly affairs (e.g. (R. 59): "* * * friendship of the world, which is commerce and politics which makes up the world is enmity with God").[17] The board could properly conclude that such statements do not show the type of abhorrence to war as such to which alone the statutory exemption relates.[18]

Aside from evidence *against* petitioner's consci-

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[16] In this connection it is pertinent to note that I-A-O (available for non-combatant duty) registrants [illegible]duction are usually assigned life-saving duties in medical and hospital facilities consistent with their beliefs against bearing or using arms. Under the 1940 law all assignments of those drafted for non-combatant service were restricted by the Army and Navy to medical and hospital activities. Selective Service System Monograph No. 11, "Conscientious Objection", p. 332.

[17] For the reasons set forth in the Government's brief in *Sicurella* v. *United States*, No. 250, this term, petitioner's claim could probably have been denied on the ground, not here reached because of the evidence of insincerity, that his beliefs, even if sincerely held, are not the type of objection for which the statute grants exemption.

[18] At the local board hearing petitioner, after being asked (R. 57) "Is there any statement in your regular creed of Jehovah's Witnesses that relates directly to war?", replied, "No, they have nothing relating directly to war. It is up to each one to go according to their own conscience".

entious objector claim there was no real corroborating evidence *for* it. Although he filed two affidavits (one of dubious accuracy), these tend to support only his ministry claim and do not relate to his belief regarding participation in war. He produced no witnesses or documentary proof to establish what he stated was an individual position regarding participation in war (he denied that the Jehovah's Witnesses faith has any tenets forbidding participation in war (R. 57; fn. 18, p. 25, *supra*). Failure to communicate one's inner beliefs might have no significance at all in many cases or even in most cases. But here was a man who claimed to spend practically all of his time (after his full work-day in a steel mill) in religious meetings, exchanging ideas, in giving talks, and in other forms of group activity with co-religionists. During these hundreds of hours in such activities it seems hardly likely that, if the registrant had a real feeling in opposition to war, he would not have expressed it and that there would not be some one who could at least sign an affidavit to support his claim of objection to war. This failure of proof, taken together with certain equivocations in his statements to the local board, the synchronization of his religious activities with pressing draft possibilities, his sudden emergence from a dissimilar religious background to become a "minister" the month after his selective service registration, the acceleration of his religious activities after the commencement of the Korean conflict, his subsequent employment in a defense plant engaged in making war weapons, the flimsy factual basis

he presented in support of his claim to being a minister for draft purposes, all combine to discredit the good faith of his objections. Taken *in toto* they provide ample basis in fact for the final action of the appeal board in classifying him I-A.[19]

II

A Copy of the Department of Justice Recommendation Was Not Required to be Served on Petitioner Prior to Its Consideration by His Selective Service Appeal Board.

Petitioner argues (Pet. Br. 51-54) that, after the hearing, he should have been served with the Department of Justice recommendation, prior to its consideration by the selective service appeal board, so that he would have an opportunity before the Selective Service System to challenge the contents of the recommendation. Petitioner also urges that he should have had access to the report of the hearing officer which was transmitted to the Attorney General.[20] But under Section 6(j) of

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[19] Petitioner in Point II of his brief (Pet. Br. 41-51) attacks the Department of Justice's recommendation on the same grounds on which he attacks the final classification by the appeal board. As we have shown, that attack is not valid. It is therefore unnecessary to reach the question of the effect of an erroneous recommendation where other evidence in the record would justify the ultimate classification. Here both the recommendation and the facts of record support the conclusion reached.

[20] It would appear that petitioner is not cognizant of the fact (see Pet. Br. p. 7) that the hearing officer's report is no longer transmitted to the Selective Service System or included in a registrant's file for evaluation. Prior to June 18, 1952, selective service regulations provided in pertinent part as follows (32 C.F.R. [1951 ed.] 1626.25(d)):

"* * * The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice

the Act, *infra*, pp. 37-38, this report is merely a step in the process by which the Department obtains information on which to base its recommendation to the appeal boards. If we are right in the conclusion that the Department's recommendation need not be made available to registrants, surely a preliminary step in the process of formulating that recommendation requires no different treatment. We shall therefore treat this question on the basis of the primary issue of the requirements with respect to the recommendation itself without further reference to the hearing officer's report.

Since there is no statutory authority for the extra procedural step demanded by petitioner, and it has not been provided for in selective service regulations, petitioner is necessarily obliged to show that its absence results in such essential unfairness as would violate due process. Consideration of the function of the Department of Justice hearing in the selective service process shows that there is no warrant for such a contention.

In *United States* v. *Nugent*, 346 U.S. 1, 6-7, the respondents argued in effect that the Department

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and the report of the Hearing Officer of the Department of Justice."

This was amended by Executive Order (E.O. 10363, 17 F.R. 5456, June 18, 1952), prior to the rendition of the Department of Justice recommendation in this case on December 1, 1952 (R. 66-68), to provide (32 C.F.R. 1626.25(c)):

"* * * The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

The hearing officer's report is thus no longer before the Selective Service System.

of Justice "hearing" was the equivalent of a "trial", and that due process therefore required that they be allowed to discover the contents of unevaluated F.B.I. reports made available to the hearing officer. This Court concluded that in view of the investigative-advisory nature of the "hearing" all of the "formal and litigious procedures" of a trial need not be accorded the registrant; that it was enough that the registrant be furnished an adequate resumé of adverse material in the possession of the hearing officer. The Court made the following observations regarding the function of the hearing in relation to the Selective Service System (*ibid.*, pp. 8-9):

> The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice. * * *
>
> If the local board denies the claim, the responsibility for review, if sought, falls upon the appeal board. The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. Congress was under no compulsion to supply this auxiliary service—to provide for a more exhaustive processing of the conscientious objector's appeal. Registrants who claim exemption for some reason other than conscientious objection, and whose claims are denied, are entitled to no "hearing" before the De-

partment. Yet in this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's "appropriate investigation" nor its "hearing" is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant.

Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. * * *

The proceeding conducted by the Department of Justice is "advice", not a determination of legal rights. The Department's recommendation is not binding on the Selective Service System and may be rejected either in whole or in part.[21] It is merely

[21] See. 32 C.F.R. 1626.25 (e) *infra*, p. 40.

one factor to be considered by the appeal board, together with the registrant's entire file as well as general information concerning "economic, industrial, and social conditions" (32 C.F.R. 1626.24(b), *infra*, p. 38). The recommendation is thus not a subject of contest. This Court in analogous situations has refused to allow a separate hearing for the purpose of contesting the sufficiency of an advisory report which is not the functional equivalent of an administrative order. In discussing the advisory report of the Tariff Commission which is submitted to the President for his final action, this Court said in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 318:

> * * * Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. * * *

Compare: *Chicago & Southern Air Lines Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (advice to the President in passing on foreign airline routes); *Williams* v. *New York*, 337 U.S. 241 (information and advice to judge on sentence to be imposed). Congress has reserved to the Selective

Service System alone the determinative function of classifying selective service registrants and the registrant has full opportunity to include his evidence and argument in the selective service file. No separate hearing need be conducted to meet the conclusions incorporated in a Department of Justice report which may or may not be acted upon in the discretion of the appeal board when it evaluates the entire file.

As more fully set forth in the brief for the United States in *Simmons* v. *United States,* No. 251, this term, Congress has provided the Selective Service System with a more comprehensive source of information and advice with respect to conscientious objector cases than with respect to other classifications because of the peculiarly subjective character of the issue involved. It was apparently felt that the selected lawyers, who for the most part contribute their services as Department of Justice hearing officers, could, in an informal type of interview, appraise the facts of a particular registrant's background and estimate whether his objections were of the "character" required, and whether they were presented in "good faith". This determination is reviewed by a Special Assistant to the Attorney General who checks it for form and substance and then formulates a recommendation which may or may not be that of the hearing officer (although in most cases it is). In this way a more uniform type of procedure is provided in this difficult area of judgment to reduce the chance of arbitrariness and unequal treatment. The whole

process is essentially the submission of the case for an expert opinion. The Act obviously did not contemplate that such opinion thereafter be litigated.

Petitioner's reliance on *Morgan* v. *United States*, 304 U. S. 1 (Pet. Br. 26, 53), is not well placed. That case was decided on the theory that a person affected by an administrative order should in all fairness have some indication of the proposals being considered before the order issues. This Court stated at 304 U.S. 18-19:

> Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> No such reasonable opportunity was accorded appellants.

This is a far cry from the instant proceeding where the registrant had ample notice that the Selective Service System intended to classify him I-A. Where the issues are thus defined, this Court has held that no intermediate report at all is required. *National Labor Relations Board* v. *Mackay Radio and Telegraph Company*, 304 U.S. 333. See also *Public Service Corp. of New Jersey* v. *Securities and Exchange Commission*, 129 F. 2d 899 (C.A. 3), certiorari denied, 317 U. S. 691; *Local Government Board* v. *Arlidge*, [1915] A. C. 120.

Before a case goes to hearing before the Depart-

ment of Justice, a registrant has had an opportunity to present any facts he wishes before the local board, in his special form, and at a personal appearance if he so requests. Before the hearing, he may obtain notice of adverse information in his file and he may rebut such adverse information before the hearing officer. At the hearing, he can give full expression to his views. He thus is given full opportunity to present his side of the case. To require service of the Department's recommendation to the appeal board upon the registrant and to permit the registrant then to contest the recommendation would not involve new facts. It would merely add an additional step for the registrant to say that he disagrees with the recommendation if it is unfavorable, a fact which the mere assertion of the claim by the registrant has made clear. There is thus no necessity for this additional step, and no unfairness in its omission.

Due process is a matter to be determined in context. *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265, 276-277. Here we are dealing with a procedure which is itself a special privilege as to an exemption which is a matter of legislative grace. Due process in such a context cannot be determined by reference to a dissimilar type of proceeding which is designed to meet far different problems. As the records in the cases now before this Court show, the special proceeding established by Congress already results in fairly long delays in the classification of persons claiming conscientious objector status. Further

delays are not to be encouraged. A registrant asserting a claim to conscientious objection has, under present procedures, ample opportunity to present his case and to rebut adverse information. The standards of due process have thus been more than adequately met.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

STATUTE AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612; 65 Stat. 75, 86:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such ci-

vilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *.

> If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

32 C.F.R. 1626.24(b) provides:

> (b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under §1626.25, and (2) general information concerning economic, industrial, and social conditions.

32 C.F.R. [1954 Supp.] 1626.25 provides in pertinent part:

> (a) * * *
>
> (2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of

the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the

appeal board that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

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